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THE ELEMENTS OF CRIME

THE MENTAL ELEMENT

The second element of a crime is the mental element.[1] In order that one may be held criminally responsible, it is not sufficient that he has done some act which the law prohibits. He must have had a certain mental attitude toward his act.

"The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime is not committed."[2]

In order to determine whether an actor is criminally responsible, it is therefore necessary to determine his mental attitude, toward his act; and in order to do this, it is necessary to determine his mental attitude with reference to each constituent part of his act.[3]

[1]The first element is discussed in 26 Dickinson Law Review 188.

[2]Reg. v. Tolson, 23 Q. B. D. 185, per Stephen.

[3]An act is composed of three parts: origin, circumstances, and consequences. 26 D. L. R. 118.

FORMS

The mental attitude required by the law may assume either one of two forms: (1) intention; (2) negligence. Negligence is, by some authorities, considered as a form of intention. But the better view is that intention and negligence are two contrasted and mutually inconsistent states of mind.

REASON

The reason for requiring this second element as a condition of criminal responsibility is that the primary and essential object of the criminal law is to deter, and in order to deter there must be a state of mind upon which threats of punishment can exert an influence.

Intention and negligence are such states of mind. A threat of punishment may furnish a motive for not desiring to commit a criminal act or for taking sufficient care to avoid it. But in no other case can threats of punishment be effective.

INTENTION

Intention consists of two elements: (1) foreknowledge of a thing; (2) a desire for it.

"An act is therefore intentional only if, and in so far as, it exists in idea before it exists in fact, the idea realizing itself as the fact because of the desire by which it is accompanied.[4]

INTENTIONAL ACTS

An act is intended only when every constituent part of it, to wit: (1) its origin; (2) its consequences and (3) its consequences, are intended. If any constituent part of the act is not intentional, the act must be classed as an unintentional act.

[4]Salmond, Jurisprudence. P. 335.

ORIGIN

In order that an act may be criminal, its origin, i. e., the bodily activity or passivity of the actor, must have been intended. Intention as to this factor of the criminal act is essential to criminal responsibility.

For the principle that the bodily activity or passivity of the actor must be intended, two reasons are found in the books:

(1) That unless the bodily activity or passivity is intended there is no act.

(2) That intention as to the bodily activity or passivity is a mental element which must accompany the act.

Bodily activity or passivity may be unintentional because it is compelled by (1) natural forces or (2) human agencies.[5]

CIRCUMSTANCES

The circumstances of an act may be intentional or unintentional. Perhaps it cannot be accurately said that that circumstances are intentional or intended; but an act is intentional with respect to the circumstances when the actor knows or blieves them to exist.

An act of which one or more material circumstances is unintentional is an unintentional act. Thus if a woman marries during the lifetime of her former husband, but believing him to be dead, she does not intentionally commit bigamy, for one of the material circumstances of her act, the fact that her husband is living, is not within her intention.

There is no general requirement of the law that all of the material circumstances of an act must be intentional in order that an act may constitute a crime. Nor is there any general rule by which to determine which of the material

[5]The limits of this article do not permit a discussion of the various forms of compulsion. Forms of natural compulsion are automatism and irresistable impulse.)

circumstances must be intentional and which need not be. A separate study of each crime is necessary in order to determine this. An act which is unintentional with respect to some material circumstance is said to be done by mistake.

CONSEQUENCES

The consequences of an act may be intentional or unintentional. A consequence of an act is intended or intentional if it is desired, whether or not it is expected.

An actor may intend a consequence which he does not expect, as where he fires a rifle at a man who is a long distance away. The actor may know that the chance of hitting him is small and may fully expect of miss him. Nevertheless the actor intends to hit him if he desires to do so.

An actor may expect a consequence which he does not intend, as where a surgeon performs an operation. The surgeon may know that his patient will probably die from the operation, nevertheless he does not intend the fatal consequence which he expects. He intends a recovery which he hopes for but does not expect.

A rule of frequent application in determining whether a consequence is intended is that a man is presumed to intend the probable consequences of his act. This, however, is merely a presumption of fact, which prevails in absence of evidence to the contrary, but which may be overcome by any evidence which raises a reasonable doubt as to the existence, in the mind of the actor, of the foreknowledge of, and a desire for these consequences.

It is true that an actor is frequently held criminally responsible for consequences which he did not forsee and desire, and responsibility in such cases is frequently said to be due to this presumption. As a matter of fact, liability is imposed in these cases regardless of intention, and the statement as to the presumption simply means that intention is not necessary to create responsibility for these consequences.

There is no general rule that all of the material conse-

quences of an act must be intentional in order that the act may constitute a crime. Nor is there any general rule by which to determine which of the material circumstances must be intentional and which need not. A separate study of each crime is necessary to determine this. An act of which one or more material consequences are unintentional is an unintentional act, and is said to be done accidentally.

NEGLIGENCE

The term negligence is used in two different senses. It signifies sometimes a state of mind and at other times conduct resulting therefrom. In the former or subjective sense it means the mental attitude of undue indifference.

The intentional wrongdoer is punished because he desired to do the harm. The negligent wrongdoer is punished because he did not sufficiently desire to avoid it. Just as the threats of punishment may deter persons from intentionally causing harm, so it may also deter persons from being indifferent whether the harm ensues or not.

In order that an act may be criminal its origin must be intentional,[6] but its circumstances or consequences need not be. Some acts are criminal though some of their material circumstances or consequences are not intentional but negligent.

Negligence exists with reference to a circumstance of an act when the actor is ignorant of this circumstance and his ignorance is due to his failure to exercise due care. Negligence exists as to a consequence of an act when (1) the actor fails to forsee it because of his failure to exercise due care or (2) the actor forsees the consequence and fails to use due care to avoid it.

An act of which one material circumstance is negligent and not intentional, is not an intentional act, and if the actor is to be held criminally responsible, his responsibility

[6]See Supra.

must be based upon negligence, or, as we shall see later, be absolute.

There is no general rule that all of the material circumstances or consequences of an act, if not intentional, must be negligent in order that the act may constitute a crime. Nor is there any general rule by which to determine which of the material circumstances or consequences must be negligent. A separate study of each crime is necessary to determine this.

Intention either esists or does not exist. There can be no question as to the degree in which it is present. Negligence may exist in any degree, and it is therefore necessary to inquire what degree of negligence is required by the criminal law in cases in which criminal responsibility is predicated wholly or partially on negligence.

This inquiry presents two questions:

(1) The standard by which the degree of the actor's negligence should be measured.

(2) The degree of deviation from this standard which is required.

There is a conflict of opinion as to whether the standard should be an external or internal standard, i. e., whether an actor's negligence should be judged by the standard of the average reasonable man or by his own standard. The weight of authority and better opinion seems to support the former view.

There is also a conflict of opinion as to whether the negligence must be gross or need only be ordinary. The weight of authority supports the view that the negligence must be gross.

CLASSES OF CRIMES

It appears from the foregoing that a crime may be either intentional or negligent. In addition, however, there is a third class of crimes, which may be designated as crimes of absolute liability. The three classes of crimes may be defined as follows:

(1) Intentional crimes, in which every part of the criminal act is intentional.

(2) Crimes of negligence, in which one or more of the material circumstances or consequences of the criminal act are not intentional but negligent.

(3) Crimes of absolute liability, in which one or more of the material circumstances or consequences of the criminal act are neither intentional or negligent.

CRIMES OF ABSOLUTE LIABILITY

Crimes of absolute liability are of two classes:

(1) Those in which one of the material circumstances of the criminal act need be neither intentional or negligent. In this class the actor is held responsible in spite of inevitable mistake. This class embraces:

(a) Certain statutory crimes.

(b) Certain crimes in which responsibility is based on constructive intent.

(b) Certain crimes in which responsibility is based on constructive intent.

(2) Those in which one of the material consequences need be neither intentional or negligent. In this class the actor is held responsible in spite of inevitable accident, and responsibility is based on the doctrine of constructive intent.

CONSTRUCTIVE INTENT

The doctrine of constructive intent is that an actor may be held criminally responsible for an act of which one of the material circumstances or consequences was neither intentional or negligent because the act which the actor did intend was criminal or wrongful.

The doctrine is applicable where one of the material circumstances of the criminal act was neither intentional or negligent. Thus where a statute made it rape to have carnal knowledge of a girl under sixteen with her consent,

and X had carnal knowledge with such a girl, reasonably believing she was over sixteen, although one of the material circumstances of the act was neither intentional or negligent, X was held guilty of rape, because the act which he did intend, carnal knowledge of a girl over sixteen, was itself wrongful.

The doctrine is applicable where one of the material consequences is neither intentional or negligent. Thus where A pushed B with intent to distract his intention in order that he might steal B's watch, and B fell and was killed by the fall, although this consequence was not forseen by A and therefore not intended, and could not have been forseen by A by the exercise of ordinary care and was therefore not negligent, A was held responsible for the death, because the act which he did intend, robbing of B, was criminal.

There is a conflict of opinion as to the character of the act which must have been intended in order that the doctrine of constructive intent may be applied. Authority may be found for each of the following rules:

(1) The act intended must have been malum in se and criminal.

(2) The act intended must have been criminal, whether or not it was malum in se.

(3) The act intended must have been malum in se, whether or not it was criminal.

MOTIVE

Motive is that which stimulates or excites an actor to commit an act, and must be destinguished from intent. Intent is the actor's purpose to commit the act. Motive is his purpose in committing it. The intent relates to the act itself. The motive passes beyond the act and relates to the object for the sake of which the act is done.

It has been frequently asserted that motive is never an essential ingredient of crime. Perhaps it is true, as a gener-

al rule, that no act otherwise lawful becomes criminal because done with a bad motive, and, conversely, no act otherwise criminal is justified or excused because of the motive of the actor, however good. The law ordinarily judges a man by what he does, not by the reasons for which he does it.

To this rule as to the irrelevance of motive in criminal cases there are, however, important exceptions. The character of an act as being criminal or non-criminal, is frequently determined by the motive with which the act was done. In many cases the motive is the source, in which or in part, of the mischievous tendency of the act and has therefore been made an essential element of the crime.

The question whether a particular motive is an essential element of a crime is not always easy to determine. The definitions of the common law crimes usually indicate whether a motive is essential or not, e. g. forgery, burglary and larceny, and this is likewise true of statutory crimes.

A particular motive may, however, be an essential element of a statutory crime even when the language of the statute does not require it. In interpreting statutes, courts have not infrequently concluded, from the evil sought to be remedied and other considerations, that it was the intention of the legislature to make the act criminal only if done with a certain motive, although there were no words in the statute expressly requiring such motive.

On the other hand courts have by interpretation occasionally eliminated from the definition of a statutory crime a motive which was expressly required by the language of the statute.

The motive of an actor may be complex instead of simple. He may act from two or more concurrent motives instead of from one only. In cases where a particular motive is an essential element of a crime, the presence of mixed or concurrent motives raises difficult questions. Must the required motive be the sole and exclusive motive; or is it sufficent that it is merely one of several motives; or must it be

the chief or dominative motive, any others being subordinate and incidental; or must it be a determining motive, that is, a motive in absence of which the act would not have been done, the remaining motives being insufficient by themselves.

STATUTORY CRIMES

It is commonly stated that a mental element is not an essential element of statutory crimes, and that the legislature may make a particular physical condition criminal regardless of the existence of any mental condition.

An examination of the authorities cited for this proposition discloses the fact that in none of them did the courts hold that the legislature had entirely eliminated the mental element. It was simply held that the legislature had provided that the mental element need not extend to particular circumstances or consequences of the act—that an actor might be held criminally responsible for an act although some of its circumstances or consequences were neither intentional or negligent.

It has been held that the power of the legislature thus to eliminate the mental element in defining crime is not without limitation; and that the legislature could not make criminal, e. g., an act which the utmost care and circumspection would not enable one to avoid, or deprive one accused of a crime of the right to invoke insanity as a defense.

SUMMARY

It therefore appears that the mental elements of different crimes differ greatly, and it is somewhat confusing and misleading to call so many dissimilar states of mind by the same name, such as "mens rea or criminal intent," because it suggests that, apart from all definitions of particular crimes, an element exists, as mens rea or criminal intent, which is always expressly or by implication involved in the definition of every particular crime.

It is hardly possible to define the mental element of crime more narrowly than by saying that it is the particular state of mind, differing in different crimes, which by the definition of the particular crime must concur with the criminal act.

But though the mental elements of various crimes differ greatly, the mental element which is ordinarily indispensable may be summed up as consisting of an intention to do an act (origin, circumstances, and consequences) which is criminal, or, perhaps, that is morally wrongful though legally innocent.

In some crimes a more complex and special mental element is required, and knowledge of particular circumstances or intention of particular consequences or a motive is necessary.

In other crimes a less complex mental element is sufficient, and an actor may be held responsible though his act was not intentional but negligent as to the circumstances or consequences which rendered it criminal or wrongful, and in some cases though his mental attitude toward these consequences or circumstances was neither intention or negligence.

The necessity for a mental element does not require that the actor should be conscious that his act is wrong from either a legal or a moral standpoint. It would therefore seem that an ability to know the moral or legal nature of the act is not an essential factor of the mental element of crime, and that an inability to do so, from whatever cause arising, should not constitute a defence in criminal cases. This is the law, except in cases where the inability arises from mental disease.

W. H. Hitchler.

MOOT COURT

COLLINS v. CARROLL

Wills—Election by Husband to Take Against Will—Wilful and Malicious Desertion—Witnesses—Party Dead—Husband and Wife—Act of May 23, 1887, P. L. 158.

STATEMENT OF FACTS

X died, devising a tract of land to Carroll in fee. Collins, X's husband, she having died without issue, claims one half of this tract under the intestate act and the right to take against the will. He, however, had for more than a year previous to the death of his wife, wilfully and maliciously deserted her, it is alleged by Carroll. Collins offered himself as a witness to refute this charge. The Court has rejected his testimony.

Harkins, for the plaintiff.

Ingham, for the defendant.

OPINION OF THE COURT

Bailey, J. A husband ordinarily has the right to take against the will of his wife, and if he elects to do so, he is entitled to such interest as if the testatrix had died intestate.

Section 23, Wills Act of 1917, P. L. 403.

But if the husband has wilfully and maliciously deserted his wife for a period of more than one year previous to the death of his wife he loses that right to take against the will. Section 5, Intestate Act of 1917, P. L. 429

Collins' right in this case then depends on whether or not he did desert his wife wilfully and maliciously. Sinse he wished to testify concerning this question, upon the determination of which his right to take against the will depends, it is important to decide whether this testimony was properly excluded.

The Act of May 23, 1887, P. L. 158, says that no person shall be incompetent as a witness by reason of his interest in the suit except in certain cases provided for by the act. This act is an enabling act. It makes competency the rule and incompetency the exception. Pattison v. Cobb, 212 Pa. 572; Allen's Estate, 207 Pa. 325; Hammill v. Supreme Council, 152 Pa. 537; Keating v. Nolan, 51 Pa. Super. 320; Shadle's Estate, 30 Pa. Super. 151.

If Collins is incompetent, it must be under one of the exceptions in the act. Section 5, (e) is as follows: "Nor where any party to a thing or contract in action is dead, and his right thereto or therein has passed, either by his own act or by the act of the law,

to a party on the record, who represents his interests in the subject in controversy, shall any surviving party to such thing or contract, or any other person whose interest shall be adverse to said right of such deceased party, be a competent witness to any matter occurring before the death of said party, unless the proceeding..... be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses." Is Collins rendered incompetent by this section?

The last clause making parties, respectively claiming by devolution, competent does not apply to this case. Carroll claimed under the will, by purchase, and Collins by virtue of the law, by devolution. It is well settled in Pennsylvania that, where one party claims under a will and the other party against the will, both do not claim by devolution.

Munson v. Crookston, 219 Pa. 419.
Rine v. Hall, 187 Pa. 264.
King v. Humphreys, 138 Pa. 310.
Crothers v. Crothers, 149 Pa. 201.
Baldwin v. Stier, 191 Pa. 432.
Myers v. Litts, 195 Pa. 595.
Shroyer v. Smith, 204 Pa. 310.
Cooke v. Doron, 215 Pa. 393.
Sturgeon v. Stevens, 186 Pa. 350.

Eliminating this last clause we will consider whether Collins is incompetent within the meaning of the exception. In Pattison v. Cobb, 212 Pa. 572, and in Shadle's Estate, 30 Pa. Super. 151, it is held that the act is uniformly construed, "in the light of the literal meaning of its words." So we will first analize the act and then discuss the interpretation given to it by the courts.

To render a person incompetent under section 5 (e) there must be (1) a thing or contract in action; (2) the decedent must be a party to it; (3) the thing or contract must now be in action; (4) the right of the dead party (therein or thereto) must have passed, (a) by his or her own act or (b) by the act of the law, to a party on the record who represents his or her interest therein ("the subject in controversy") (5) the interest of the witness must be adverse to the said right of the deceased.

Applying this to the case at bar: (1) What was the thing or contract in action here (2) to which the decedent was a party? Was it the will? "By 'thing or contract' therefore, is meant any acts, omissions, states, events involving legal results the right of affirming or denying which, the law accords to persons." Trickett, Law

of Witness, 130. It could not be the will. A party to a thing or contract in action acquires a right or incurs an obligation thereby, enforceable by an action. X acquires no rights nor incurred any obligations by reason of making her will. It gave her no action against any one, nor any one an action against her. It had no effect until her death. She could have torn it up or made a new will without changing any of her own rights or obligations.

(3) Since there was no thing or contract in action before the death of the decedent, "the thing or contract" cannot now be in action.

(4) What right of the decedent has passed to Carroll? Certain rights of the deceased may have passed by virtue of the will, but they are rights in tangible things such as lands and chattels which are not things or contracts in action. "The physical chattel or land, the right to a sum of money or a share in an enterprise, is not the thing or contract. By the thing or contract in action is meant the acts of forbearances, the contract, tort, grant, concerning lands, etc., which is the subject of controversy." Trickett, Law of Witnesses, 378. Carroll represents no right or interest of the deceased in any such thing or contract.

(5) Is Collins' interest adverse to said right of X, i. e., the right in the thing or contract in action? His interest seems to be adverse to her wishes as expressed by her will rather than to any legal right of hers. Certainly he had no interest adverse to hers in any thing or contract in action, nor in any of her physical chattels or land during her lifetime, nor to her right to dispose of her separate estate by will according to law, for such right to dispose of her estate was limited to that part of the estate which he did not take under the Intestate Act. We cannot say that she could dispose of all of her property by will because of Collins' wilful and malicious desertion of her, since such desertion has not yet been established, and is in fact the very matter in dispute.

Hence, construing the statute literally, we find Collins a competent witness. The question however, is not thus disposed of. The act is said to be merely declaratory of the law as it existed since the acts of April 15, 1869, P. L. 30, and April 9, 1870, P. . 44. Pennell v. Phillips, 20 Dist. 843. It is in fact drawn in almost the exact words used by Justice Agnew in Karns v. Tanner, 66 Pa. 297, in stating the law as it existed in 1870.

Prior to 1869 any one, a party to the record or whose rights would be affected by the outcome of the suit, was incompetent. 10 Pa. 45. Section 1, of the Act of 1869 made all persons competent witnesses with certain exceptions, one of them being, "this act shall not apply to actions.....where the assignor of the thing

or contract in action may be dead." In Karns v. Tanner, supra, Justice Agnew said that "assignor" was not to be used in its narrow sense, and held the act to mean a "party" to a thing or contract in action. Under this act, then, the dead person must have been a party to a thing or contract in action. If the words of the statute are to have any meaning. Adverse interest was not sufficient to render a witness incompetent. All the cases during the period from 1869 to 1887 holding persons incompetent under Section 1 of the Act of 1869 were cases in which there was some thing or contract in action, such as a grant, contract, tort action or claim arising before the death of the decedent, to which he was a party. We therefore believe that under the law as it was construed during that period Collins would have been competent, and if the Act of 1887 merely declared the then existing law, he should be competent now.

But since this act has been passed there seems to be conflict in the decisions. In Burkett's Estate, 5 Pa. C. C. 501, decided in 1888, a widow, claiming against her husband's will the $300 worth of exempted property was allowed to testify to facts occurring before the death of her husband; there is no reason why, under the same circumstances, a husband may not testify to facts occurring before the death of his wife. And in Hayes' Estate, 23 Pa. Super. 570, a husband claiming against the will of his wife was held competent to testify in order to explain his separation from his wife. But in Munson v. Crookston, 219 Pa. 421, a similar case, the court said, "But the admission of the husband as a witness, though an error, did the appellant no injury," because a prima facie wilful and malicious desertion had not been established. And in Schreckengost's Estate, 77 Pa. Super. 235, it was said not to be error to exclude the wife. However she was allowed to take against the will on other grounds. The decision of the question of competency was unnecessary to the decision of these last two cases, and therefore the statements of the courts were simply dicta. The most recent case, Phillip's Estate, 271 Pa. 129, exactly like the case at bar, held the husband incompetent to testify and reversed the lower court for admitting his testimony. There was no discussion of the relevant section of the act further than to say that his interest was adverse, and therefore he was incompetent. In these three cases holding the surviving spouse incompetent, more attention was paid to the question of whether the parties were claiming by devolution than to their competency regardless of whether they both claimed by devolution or not.

We do not believe that the case of Phillip's Estate has definitely settled the law on this question, and we cannot agree with the

decision in that case. Adverse interest was the sole reason advanced by the court for the exclusion of the witness. We believe that there must be other facts present, (mentioned in the analysis of the act, supra.) else the first part of the section is meaningless or mere surplusage. If the Legislature had meant adverse interest to be sufficient to exclude a witness, it could have said so much more plainly and simply.

The justification of the rule of exclusion, expressed in the metaphor, "If death has closed the lips of the one party, the policy of the law is to close the lips of the other," is based on the presumption that the majority of the people are liars. The exception to the general rule of competency is wholly the creation of statute; for as all interested persons were excluded at common law, and then all made competent by statute, with certain exceptions, these exceptions can be defined only by the statutes creating them. We can see no reason for extending the scope of the statutory exception based on such a presumption as the above, and must be governed by the express words of the act, which, as we have shown, render Collins a competent witness.

It was error for the court below to exclude his testimony. The decision is reversed and a new trial granted.

COMMONWEALTH v. RICHARDS

Criminal Law—Murder—Confession—Evidence—Robbery

STATEMENT OF FACTS

Richards and Jackson went together to X's store for the purpose of robbing. They made no agreement to shoot anyone, or for the use of violence to the person of any one. On arriving at the store Jackson agreed to enter while Richards remained outside, to give the alarm, should any one intervene. Jackson entered, and unexpectedly found X, shot and killed him. This is a prosecution for murder. A written confession of Richard's recited various events of his life envolving crime, was offered by the prosecution. He objected to the parts not pertaining to the particular crime under investigation, and the court excluded those parts. He then objected to the reading of the relative parts, but the court admitted it. He objected to the use of the killing to implicate him in murder, because there was no evidence that said killing was thought of by him, that his purpose was simply robbery, that the shooting by his confederate was not thought of as a possible occurrence. Verdict of murder in the first degree.

OPINION OF THE COURT

Pipa, J. Two questions present themselves for our determination. First, whether the trial court should have excluded the whole confession or whether the trial court acted properly in excluding part of the confession by request of the defendant and admitting that part which pertained to the particular crime. Secondly, did the trial court properly allow the evidence of the killing to be used to implicate Richards in murder, although no proof was offered that the killing of a person was in any way thought of by him?

As to the first question, where a confession is offered in evi- and the court strikes out, at the request of the defendant, a portion of it which relates to the defendant's criminal record, the latter can not then demand that the whole of the confession be stricken out on the ground that when a confession is offered it must go in as a whole. In such a case the defendant can not complain on appeal of the action of the court in excluding, at his own instance, a portion of the confession. The portion of the confession which was excluded was in regard to the defendant's conviction of crime on previous occasions. If this were admitted it certainly would have tended to prejudice the jury against him, and its exclusion was of course to his advantage. It would be mere trifling to permit him to exclude a portion of it and then permit him to use the favor granted as a ground of objection against the admission of the remainder of the confession, because it no longer contained the whole of it. When he was permitted to object successfully to a portion of it, he must be regarded as having waived his right to the application of the general rule which requires the whole of the confession to go in. Comm. v. Comporto, 233 Pa. 10.

As to the second point, proof of a plan to kill or even of an expectation that killing may result, is not necessary to this conviction, for the rule of criminal responsibility in case of conspiracy or combination seems to be that each is responsible for every thing done by his confederates which follows incidentally in the execution of the common design, as one of the probable and natural consequences, even though it was not intended as a part of the original design or common plan. It has been held in this state that, when several are engaged in a robbery and one shoots and kills the victim, all are equally guilty. It is not material which of the two fired the fatal shot, both participated in the common purpose and from the fact that one of them was armed with a deadly weapon, a part of that purpose undoubtedly was to commit murder if necessary to carry out the purpose even though there was not any agreement to commit murder.

By the 44th section of our statute of 1860 each one is triable and punishable as if he had fired the pistol.

Leaving out of view the purely technical objections of the defendant's counsel to some of the courts rulings on evidence, independently of these, the facts as stated and the law as announced, establish beyond controversy the guilt of the defendant. Comm. v. Biddle, 200 Pa. 640.

It is ordered that the judgment be affirmed and that the record be remitted to the court below, that the sentence be executed.

OPINION OF SUPREME COURT

Prolonged discussion of the question here presented is unnecessary.

The rule is that the whole of a confession, if any part must be put in evidence, a rule made for the benefit of the confessant. But, the accused preferred that a part of his confession should not be read to the jury, and obtained from the court, an order excluding that part. Thus succeeding, he makes the court's action a ground for compelling it to withdraw the rest of the confession. The court has properly refused as the judgment of the court below maintains. Its decision must therefore be Affirmed.

PAGE v. MORTON

Mortgage—Bond and Warrant—Judgment Affidavit of Ownership—Act of April 23, 1903, P. L. 261

STATEMENT OF FACTS

This is an action of ejectment by the purchaser of land on an execution of a judgment on a warrant of attorney. X gave Y a mortgage on a lot for $1000 and a bond with warrant of attorney to confess judgment. The mortgage was at once recorded. X sold the land subject to the mortgage to Morton. Y assigned the bond and mortgage to Page, the plaintiff. Page entered judgment on the warrant, giving no notice to Morton. On an execution on this judgment the land was sold to Page, who in this action seeks to obtain possession.

Miss Everhard, for the plaintiff.

Miss Burr, for the defendant.

OPINION OF THE COURT

Glazer, J. There are several points raised in this case, each of which bears on the final determination of the issue, whether the plaintiff is entitled to possession.

The first question is that of the relationship of the defendant Morton to the transaction. It appears that he is a terre-tenant, defined as "one who purchases or becomes the owner of land which is encumbered," or as "one not the mortgagor who becomes seized or possessed of land subject to the making of the mortgage and subject to its lien." Bouvier's Law Dictionary; Trickett on Liens, Vol. III., P. 109.

The next point for consideration is the right of the plaintiff, the assignee of the mortgagee, to confess judgment on the bond and warrant of attorney, and to levy execution on same, without having recourse to satisfaction of the mortgage itself. In O'Mally v. Pugliese, 272 Pa. 357, the Supreme Court held that a mortgagee or his assignee may enter judgment on a warrant of attorney, accompanying a bond, though the obligation itself has not matured but points out that the judgment and execution thereon remains within the control of the court. The decision makes unnecessary any discussion as to the necessity of foreclosing the mortgage before entering judgment on the warrant of attorney.

But all this must be waived aside in the determination of the question of necessity of notice to a terre-tenant when execution is barred on a judgment on a warrant of attorney. Before the Act of April 23, 1903, P. L. 261, which amended the Act of July 9, 1901, P. L. 617, the courts held that notice to a terre-tenant was unnecessary; that the land could be sold and possession taken without the terre-tenant becoming aware of any contemplated action on the part of the mortgagee.

This obvious hardship worked by this unequitable principle led to the adoption of the Act of 1903 (supra) which provides that "the plaintiff in any writ of ejectment or any writ of summons to recovercover.....in any writ to charge particular land with the payment of a particular debit running with the land, shall file with his praecipe an affidavit, setting forth to the best of his knowledge information and belief who are the owners of the land charged, or in the action of ejectment are claimants thereof as the case may be, and all persons shall be made parties to the writ which shall be served by the sheriff..... This act gives the terre-tenant an opportunity to satisfy the obligation and prevents any chance of perpetration of fraud on the terre-tenant.

In Kern v. Mayhue, 26 C. C. 390, on a question similar to the one before us, the court held that notice to a terre-tenant was necessary where the land is sold on a lien, whether the proceedings be by scire facies on the mortgage or fiere facias on the judgment entered upon the bond, since, on the latter case the lien runs with the land.

In the case at bar, it is admitted that plaintiff failed to give notice to defendant and that latter had no opportunity to defend the action. In Trickett on Liens, Vol. III., P. 391, it is said "that a terre-tenant who is not made a part to the scire facias and who does not intervene to defend it, is not concluded by the judgment which may be recovered by the mortgagee, but in a subsequent ejectment between him and the purchaser at the sheriff's sale sur mortgage, may make all the defences which he might have made to the scire facias..... (In support of this the following cases are cited: Spencer v. Jennings, 114 Pa. 618; Barbour v. Werhle, 116 Pa. 308.

This, together with the act quoted, seems to clearly indicate that the plaintiff's failure to give notice is a fatal weakness on his claim to title. This failure on plaintiff's part, might give rise to the suspicion of an intent to defraud the defendant, but since no fraud has been alleged, that question needs no determination.

In view of the act and the authorities cited thereunder we feel constrained to deny the plaintiff's right to possession and to declare the law of execution or the judgment invalid. We therefore enter judgment for the defendant.

OPINION OF SUPREME COURT

The learned court below has given reasons for holding that the sale on the judgment entered on a warrant of attorney given by the mortgagees, is not valid, as against the present owner of the premises, although he acquired the land subject to the mortgage. Keene v. Startzell, 135 Pa. 110, takes a different view. The judgment was simply a means of foreclosing the mortgage. Its lien "relates back to the day the mortgage was recorded, and a sale upon it discharges the lien of the mortgage." The case is not within the intention of the act of April 23, 1903, P. L. 261.

Despite the care shown in the opinion of the learned court below, it is necessary that its judgment be Reversed.

NICHOLS v. EMERSON

Lateral Support—Removal of—Measure of Damages

STATEMENT OF FACTS

Nichols owned a tract 100 feet wide, facing on X street. On the western side of this lot he built a house, where eastern wall coincided with a line running from front to rear. He sold the 50 feet to the east of this line to Emerson, who builds a house on it, and in

doing so excavates the soil to the depth of 10 feet. The result is that the eastern wall of Nichols' home falls in, and drags with it the entire house. In this action of trespass, Nichols claims the exit of the re-erecting of the house or the difference of the value of the lot with the house from that of the lot without the house. The verdict has ascertained their difference to be $9,000.

Rubinstein, for the plaintiff.

Orlando, for the defendant.

OPINION OF THE COURT

Yaste, J. Two questions for consideration present themselves to this court:

1. Whether the defendant in building his house and excavating the soil to the depth of ten feet is liable to the adjoining owner for injuries resulting from his excavations.

2. Whether the defendant under the circumstances is liable to the adjoining owner for injury to the plaintiff's house, located on the land which has subsided without proof of any negligence on part of the person making excavations.

Taking up the first question. Under the common law rule the owner of land is bound to so conduct his operations in the excavation or removal of minerals from the land as not to disturb the adjacent land and do injury to the owner thereof. This is a settled law in England, followed in this country, and well settled in Pennsylvania. In McGettigan v. Potts, 149 Pa. 155 and Matulop v. Coal & Iron Co., 201 Pa. 70, it was held that the plaintiff was entitled to the natural lateral support of her land on grounds, and if the same were withdrawn by her neighbor in mining operations on the same land, for an injury to her lots resulting from withdrawal of such support or from excavations, compensations must be made. The right to such lateral support is an absolute one and if the adjoining owner withdraws it or excavates, whether negligent or not, he is liable for injuries resulting to his neighbor's land. In the first case cited, Justice Green citing Gilmore v. Driscoll, 122 Mass. 199, and McGuire v. Grant, 1 N. J. 356, with approval says: "But in the case of land which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition and it is the necessary consequence from this principle that for any injury to his soil resulting from removal of natural support to which it was entitled, the owner has a legal remedy in an action at law against the party by whom the work was done. This does not depend on negligence, but upon violation of a right of property which has been invaded. This unqualified rule is limited to injuries caused to land itself and does not afford relief for damages by the same means to artificial structures or buildings. For an injury to

buildings, which is unavoidable, incident to the depression, or affected by any act of his neighbor, and if the neighbor digs upon or improves his land so as to injure the right, an action may be maintained against him for damages without proof of any negligence." There is no doubt whatever as to the soundness of this view, further discussion of the first question is unnecessary, and therefore must be answered in the affirmative.

The second question can be answered by referring to the cases cited above. It has been held that the lateral support of land to which the owner thereof has an absolute right and for the deprivation of which by his neighbor he can maintain an action without proof of negligence, extends only to the land itself in its natural condition, and does not include support for protection of buildings upon it. This is well settled in England and also in our country. Since this absolute right is limited to the right itself in its natural condition, there can be no recovery for injuries to buildings or improvements resulting from withdrawal of such support in the absence of proof of negligence or carelessness in excavating adjoining land. This is equally well settled and the rule is nowhere more distinctly announced than in Doley v. Wyeth, 2 Mass. 131, where the court after referring to absolute rights of an adjoining owner of land to lateral support for its in its natural condition said: "It is a slide of the soil, on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill or positive negligence as contributed to produce it." In Alexander v. Colon, 72 Superior 1, the court expressly ruled upon this point as follows. Negligence or want of due care in excavating adjoining lands for which there is liability for injury to a neighbor's building means positive negligence or manifest want of due care, in the excavating operations, so far as they affect adjoining properties. In the absence of any evidence of such negligence there can be no recovery. It is well settled that there is no liability for injury to a house, fence, a chicken house, a building, a wall, unless there has been negligence.

McGettigan v. Potts, 149 Pa. 155.
Matulys v. Coal & Iron Co., 201 Pa. 70.
McQuire v. Grant, 1 N. J. 356.

No evidence of the negligence of the defendant was given. Negligence is not presumed, it must be proved. We must assume that whatever would have been reasonably expected of the defendant, to avert a pissible injury to the house, he did. For disturbance of the plaintiff's land, as distinguished from the building, by the defendant's excavation, the latter is liable whether they were made with care or not. This case recognizes the principle of Alex-

ander v. Colon, 72 Superior 1. Hence, the second question presented must be answered in the negative.

In the lower court Nichols claims value of the erecting of the house, and that of the lot without the house. This verdict has ascertained this difference to be two thousand dollars. In view of the authorities above stated, this court can not decide with the lower court on its verdict.

The decree of the court below is reversed.

OPINION OF SUPREME COURT

The plaintiff is not claiming damages for the caving in of his ground. He furnishes no evidence as to the extent of such damages. What he demands is the cost of the re-erection of the house, or the difference in value of the ground without, and its value with the house.

There is no liability for injury to a house or other building, by excavating on the defendant's lot, unless there was negligence. The learned court below has indicated that there is no evidence of negligence. Possibly to create an execution so deep as ten feet would be negligent, but, that it was, does not appear. Nor does it appear that the caving in of plaintiff's ground, would have occurred, but for the pressure of the house upon it. Defendant did not owe support sufficient to sustain the ground, despite artificial weights placed on it. It does not appear then, that there is any liability.

But if there was liability, it was not to pay the difference between the value of the plaintiff's lot with, and its value without the house, or the cost of re-erection of the house. McGettigan v. Potts, 149 Pa. 155. "The amount of the injury actually done to the plaintiff's land," must be shown, and only for it there can be a recovery. That amount has not been shown.

The learned court's opinion might have been clearer, but we understand it to lay down the doctrines thus enunciated. The judgment is therefore Affirmed.

HUGHES v. MARKS

Negotiable Instruments—Checks—Holder in Due Course—Burden of Proof—Evidence—Admissibility

STATEMENT OF FACTS

Marks drew a check for $250, payable to Simpson, who, three days afterwards indorsed it to Hughes. Hughes presented the check to the bank for payment five days after it was drawn. The bank told him that Marks had ordered not to pay the check. Marks, sued

as drawer, depends on the ground that Simpson obtained the check by fraud. Hughes testifies that he had no knowledge of the fraud when he received the check for which, he gave a consideration. the court not submitting this testimony to the jury, directed it to return a verdict for the plaintiff. Motion for a new trial.

Kahaner, for the plaintiff.

Forman, for the defendant.

OPINION OF THT COURT

Satterlee, J. We are of the opinion that the lower court erred in not admitting the testimony of the defendant and entering a verdict for the plaintiff.

There seems to be no question in the minds of the court but what the check was issued in due course. According to Section 59 of the Negotiable Instrument Act, we find the definition laid down "that every holder is deemed prima facie to be a holder in due course." It further says that if the title is defective, the prima facie presumption is overcome and a contrary presumption is created in favor of the maker, and it is for all purposes a thing of substance and value to the party defending. The failure of the lower court to admit the defendant's testimony is strictly a deprivation of the defendant's rights, and as such was the case the defendant was not accorded the privilege given him by the act to rebut the prima facie presumption.

In deciding our opinion we are forced to base our verdict upon the rulings as laid down in McKinley v. Wainstein, 74 Pa. Super. Ct. 482. With the facts similar to those at bar, the court held it reversible error on the part of the lower court to exclude the testimony of the defendant. They held that by excluding the testimony, the defendant was deprived of his right to rebut the presumption, and prove to the satisfaction of the court, the circumstances under which the check was issued.

In view of the foregoing, we are of the opinion that the lower court erred in granting a verdict for the plaintiff and as it has been held to be reversible error by a recent case with similar facts, we do not hesitate in reversing the judgment of the lower court.

OPINION OF SUPREME COURT

We assume that the check was payable to Simpson or his order, i. e., was negotiable.

It was endorsed to Hughes, who thus acquired the legal title to it.

Marks, the drawer, has countermanded the order on the bank contained in the check, and has thus prevented the bank's paying it.

Hughes has sued Marks, the maker. No defence is visible, unless (a) fraud was practiced on Marks by Simpson, and unless (b) Hughes paid nothing for the check, or had knowledge of the fraud, when he purchased the check.

Marks has shown fraud by Simpson.

But Hughes has testified that he had no knowledge of this fraud, and that he paid a consideration for it. He was a competent witness, and why his testimony was not submitted to the jury, with instruction that if they believed it, he was entitled to recover, even if the fraud of Simpson was established, we do not understand.

A fraudulently procured check can be defended against as to one who is a gratuitous holder of it, not a purchaser in due course, but cannot be, as respects a purchaser for value who purchased it bona fide.

The judgment of the learned court below is Affirmed.

DAUGHERTY v. KEMMERER

Contract—Sales Contract—Return of Articles by Customers

STATEMENT OF FACTS

Daugherty placed fifty copies of "Blood and Sand" in Kemmerer's hands for sale. After selling them Kemmerer took back twenty copies from purchasers and wants credit for them. There had previously been ten returns out of fifteen copies sold and Kemmerer had been allowed by Daugherty, credit for them, but when he received the fifty copies no reference was made to the previous transaction.

Plaintiff insists on recovering the price of the fifty copies.

Parsons, for the Plaintiff.

Neuman, for the Defendant.

OPINION OF THE COURT

Shaw, J. In the case at bar the fact that Daugherty placed fifty copies of "Blood and Sand" in Kemmerer's hands for sale created a contractual relationship between the parties. Kemmerer was evidently to collect and account for the proceeds from the sale of the books. The fact that Kemmerer received the fifty copies of "Blood and Sand" without being stipulated in the agreement his right to turn back copies that may be returned by purchasers and receive credit for them must be governed by this intention of the parties.

The question to be determined is whether the evidence of the previous custom of returning copies can be admited to show the de-

fendants right to return the copies unsold. There is evidence from the course of dealings between the parties that Kemmerer had previously been allowed by Daugherty credit for ten copies returned out of fifteen copies sold.

Since the right to return has been previously recognized, the fact that Kemmerer received the fifty copies for sale without mention of the prior custom, estops Daugherty to deny Kemmerer's right to return the twenty copies that have been returned by purchasers even though the right is not mentioned in the latter agreement.

In Tabard Inn Book Co. v. Snellenberger, 65 Sup. Ct. 177, the lower court permitted the defendant to show that the course of dealings of the parties previously had permitted defendant to send back books that had been returned by customers and that credit had been allowed for them, and that thus plaintiff had recognized the defandant's right to return. There was nothing in the agreement to cover the subject. The jury found for the defendant and was upheld by the Superior Court which ruled that the verdict must be based on the understanding of the parties.

In view of the recent Superior Court decision in 65 Sup. 177, which is based on facts very similar to the case at issue, judgment is rendered for the defendant.

OPINION OF SUPREME COURT

The books were put into the defendant's hands for sale. Until sale, he was not liable for their price. Some have been sold, and he has permitted the buyers to return them, and insists that he is not bound to account for their price. Is he?

Ordinarily, having completed a sale, he would not have the right to rescind it, and so escape liability for the price. The right to sell does not embrace that to cancel a completed sale. But, it may have been the understanding of the parties that defendant should be allowed to cancel any sales and permitted to return to the plaintiff books whose sales had been thus rescinded, instead of their price. May we resort to their previous dealings as evidence? Fifteen previous contracts of a similar sort had been made. Under ten of them there had been an undisputed return of books, whose sales had been cancelled. It does not appear that the right thus to return books, had been questioned in the other cases. This fact may be considered in learning the intentions of the parties.

For reasons given by the learned court below its judgment is Affirmed.

HARLAN'S ESTATE

Decedents' Estate—Claims for Services—Physician—Gratuitous Services

STATEMENT OF FACTS

Mrs. Harlan, a very poor old lady had a sick child, to attend whom she called in Dr. Forbes, who was accustomed to give services in such cases without demanding satisfactory compensation. He had no intention of claiming compensation in this case. Three years later, Mrs. Harlan died leaving an estate of $275.00. Dr. Forbes presented a demand for $25.00. The auditor has rejected the claim, on the ground that when the services were rendered they were intended to be gratuitous.

Claster, for the plaintiff.

Croop, for the defendant.

OPINION OF THE COURT

Crow, J. The question arising in this case is, whether the estate of the deceased is bound to pay the claim for professional services rendered by the plaintiff during the lifetime of the deceased.

It is our opinion that the auditor's report was correct and it should be confirmed.

We find that the law is well settled that there can be no recovery for voluntary services. In 24 C. J., Sec. 879, we find that, "Compensation cannot be allowed for services which were performed without any claim for payment during the decedent's lifetime, or any expectation of being paid specifically therefor, and without any express or implied promise of remuneration." In Pa., even though their performances may have been prompted by the hope of obtaining a gift or legacy which has not been fulfilled, they cannot recover any compensation. Estate of Mahlon Miller, 136 Pa. 239. We also find that even if the deceased directed his executors to pay for services rendered voluntarily to the decedent, it will not create a claim against the estate. Fehl's Estate, 13 Superior 601. These two cases cited present even stronger claims against the estate than the case at bar, yet there was no recovery in them on the stronger and clearer claims.

"Claims for services against a decedent's estate, not made during the lifetime of the decedent, are looked upon by the courts with a great deal of suspicion, and in order to establish such a claim the evidence must be other than that of mere loose declarations, and must be such as to clearly and distinctly establish a contract, either express or implied, between the claimant and the decedent." Weaver's Estate, 182 Pa. 349. We cannot see where the evidence in the

case at bar is such that would clearly establish a contract between the claimant and the decedent.

In Nagy's Estate, 64 Superior 28, the facts are directly as the facts in the case at bar. The doctor in this case administered professional services to the minor children of a widow and he did it gratuitously. The doctor was paid by a coal company for services rendered their employees, but as the widow and children were not employees of the coal company, it can not be said that he rendered services expecting compensation from the coal company as was contended by the counsel for the plaintiff. This case holds that, "Where a physician renders gratuitous services to the minor children of a widow, he cannot after the death of the widow change his mind, and present a claim against the estate of the widow for payment for his services on a Quantum Meruit.

An auditor's finding of fact is like the verdict of a jury; it is binding upon the court, unless manifest error is made apparent in the finding or in the verdict. 64 Superior 28. We must therefor take the question of fact as being true, and that is that the doctor's intention was to render the services gratuitously. With this fact settled we can see no room for an inference of an implied contract as is contended by the counsel for the plaintiff. The cases and authorities on this point are unanimous, and the auditor's report is accordingly confirmed.

OPINION OF SUPREME COURT

The reasons assigned by the learned court below, and the authorities cited by it, fully sustains its decision. The judgment is Affirmed.